In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5857

LOREN CRAIG SIMS,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

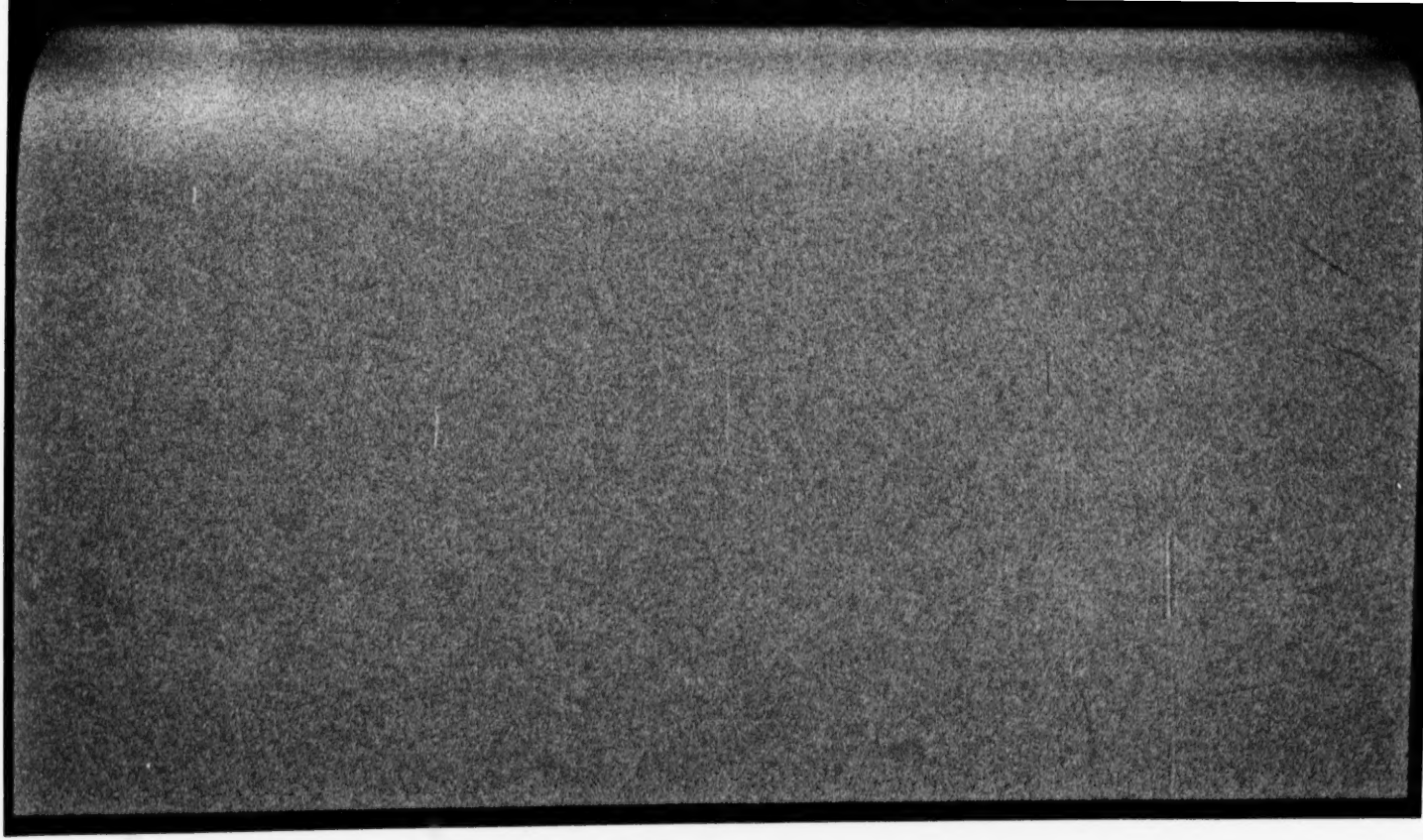
ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE ATTORNEY GENERAL FOR THE STATE OF UTAH RESPECTFULLY SUBMITS THE BRIEF IN RESPONSE.

VERNON B. ROMNEY
Attorney General

MARK L. SHURTLEFF
Assistant Attorney General



STATEMENT OF JURISDICTION

Respondent respectfully challenges the jurisdiction of this Court generally to hear the petition here involved. The general challenge of jurisdiction is made pursuant to Rule 19, Rules of the Supreme Court, 28 U.S.C., which states that in order for this Court to grant certiorari it must be found that the state court decided a federal question of substance in a way not in accord with applicable decisions of this Court. Respondent respectfully submits that no federal question of substance found in the petition here presented were decided in a manner inconsistent or in contradiction with applicable decisions of this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

ARGUMENT

POINT I:

(A) PETITIONER'S UNSUPPORTED ATTACK UPON THE SUFFICIENCY OF EVIDENCE AT TRIAL DOES NOT PRESENT A CONSTITUTIONAL ISSUE REVIEWABLE ON PETITION FOR WRIT OF CERTIORARI 7

(B) THE FACTS PRESENTED AT TRIAL WERE SUFFICIENT TO SUPPORT PETITIONER'S JURY CONVICTION OF THE CRIME OF RAPE UNDER UTAH LAW 8

POINT II:

(A) THE DENIAL OF PETITIONER'S MOTION FOR A CHANGE OF VENUE AT TRIAL WAS NOT AN ABUSE OF DISCRETION AFFORDING PETITIONER REVIEW BY THIS COURT ON WRIT OF CERTIORARI 15

(B) THE EVIDENCE SUPPORTS THE PROPRIETY OF THE TRIAL COURT'S REFUSAL TO GRANT DEFENDANT'S MOTION AT TRIAL FOR A CHANGE OF VENUE 16

POINT III:

(A) RESPONDENT DENIES, FROM THE FACTS, PETITIONER'S MOTION TO DISPOSE THE PROSECUTRIX WAS PROPERLY PRESENTED AT TRIAL. EVEN IF SUCH MOTION WAS DENIED BY THE TRIAL COURT, THE DENIAL WOULD NOT CONSTITUTE A VIOLATION OF DUE PROCESS OF LAW REVIEWABLE BY THIS COURT ON WRIT OF CERTIORARI 20

TABLE OF CONTENTS—Continued

Page

(B) APPELLANT'S CONTENTION THAT DUE PROCESS OF LAW WAS DENIED HIM, WHEN THE TRIAL JUDGE REFUSED TO GRANT HIS MOTION TO DEPOSE THE PROSECUTRIX, IS A MISSTATEMENT OF THE FACTS 21

POINT IV:

(A) THE TRIAL COURT JUDGE DOES NOT VIOLATE DUE PROCESS BY RULING ON THE ADMISSIBILITY OF MATERIAL EVIDENCE 23

(B) NO REVERSIBLE ERROR UNDER UTAH LAW WAS COMMITTED BY THE TRIAL JUDGE IN ALLOWING THE PROSECUTION TO INTRODUCE INTO EVIDENCE THE CLOTHING WORN BY THE PROSECUTRIX AT THE TIME SHE WAS RAPED 24

POINT V:

(A) THERE WAS NO DENIAL OF DUE PROCESS OF LAW BY THE INTRODUCTION OF THE TESTIMONY OF ROBERT YOCKEY 26

(B) REVERSIBLE ERROR WAS NOT COMMITTED, UNDER STATE LAW, NOR UNDER THE FACTS, BY THE INTRODUCTION OF THE TESTIMONY OF ROBERT YOCKEY 27

POINT VI:

(A) THE EXCLUSION OF COLLATERAL OR EXTRANEOUS EVIDENCE IS WITHIN THE SOUND DISCRETION OF A TRIAL COURT, AND DOES NOT VIOLATE DUE PROCESS OF LAW 29

(B) THE TRIAL COURT WAS CORRECT, UNDER UTAH LAW, IN REFUSING TO ADMIT THE TESTIMONY OF JACK BRADY CONCERNING THE PROSECUTRIX'S REPUTATION 30

CONCLUSION 33

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

FEDERAL

Akins v. Texas, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692 (1945) 8, 30

Baldwin c. Kansas, 129 U.S. 52, 9 S.Ct. 193, 32 L.Ed. 640 (1889) 8

Barrington v. Missourt, 205 U.S. 483, 27 S.Ct. 582, 51 L.Ed. 890 (1907) 21, 24

Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962) 17

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d. 215 (1963) 23

Buchalter v. People of the State of New York, 319 U.S. 412, 63 S.Ct. 1126, 87 L.Ed. 1483 (1943) 21

Burrows v. United States, 371 F.2d 434 (10th Cir. 1967) 26

Estes v. United States, 335 F.2d 609 (5th Cir. 1967, cert. den., 329 U.S. 964, 85 S.Ct. 656, 13 L.Ed.2d. 559, rehearing den., 380 U.S. 926, 85 S.Ct. 884, 13 L.Ed.2d 814 17

Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) 26

Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 546, 13 L.Ed.2d. 408 (1965) 16

Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910) 18

Irwin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d. 751 (1961) 18

Jayson v. United States, 294 F.2d 808 (5th Cir. 1961) 30

TABLE OF CONTENTS—Continued

Page

Kersten v. United States, 161 F.2d 337, cert. den., 331 U.S. 851 (10th Cir. 1947) 16

Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946) 8

Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1934) 22

Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d. 1277 (1959) 22

N.L.R.B. v. Donnelly Garment Co., 330 U.S. 219, 67 S.Ct. 756, 91 L.Ed. 854 (1947) 20

Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1878) 18

Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d. 600 (1966) 17

Spies v. Illinois, 123 U.S. 131, 8 S.Ct. 21, 31 L.Ed. 80 (1889) 18

Stroud v. United States, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919) 15

United States v. Garrison, 291 F. 646 (1923) 22

United States v. McNally, 485 F.2d. 398 (8th Cir. 1973) 15

Wolfe v. State of North Carolina, 364 U.S. 177, 80 S.Ct. 1482, 4 L.Ed.2d. 650 (1960) 7, 24

STATE

Jackson v. State, 470 S.W.2d. 201 (1971) 31

Meyers v. State, — Tex. Crim. App. —, 491 S.W.2d. 412 (1972) 22

People v. Cox, 383 Ill. 617, 50 N.E.2d. 758 (1943) 31

People V. Gabler, 111 Ill. App.2d. 121, 249 N.E.2d 340 (1949) 30

People v. Scott, 10 Utah 2d. 217, 37 P. 335 (1920) 30

TABLE OF CONTENTS—Continued

Page

Reynolds v. State, 292 N.E. 2d. 290 (Ill. 1973) 22

Shepard v. State, Okla. Cr., 437 P.2d. 565 (1967) 31

Sinclair v. Turner, 20 U.2d. 126, 434 P.2d. 305 (1967 affir.), 447 F.2d. 1158 (10th Cir. 1971), cert. den., 391 U.S. 924 (1968) 19

State v. Bebee, 110 Utah 484, 175 P.2d. 478 (1948) 16

State v. Berchtold, 11 Utah 2d. 208, 357 P.2d 183 (1960) 14

State v. Boyes, 47 Utah 474, 155 Pac. 335 (1916) 10

State v. Carrow, 64 Utah 87, 228 Pac. 563 (1924) 16

State v. Faux, 9 Utah 2d 350, 345 P.2d 186 (1959) 22

State v. Green, 86 Utah 192, 40 P.2d 961 (1935) 16

State v. Hodges, 14 Utah 2d 197, 381 P.2d 81 (1963) 7, 10

State v. Jarett, 112 Utah 335, 178 P.2d 547 (1947) 28

State v. Laub, 102 Utah 402, 131 P.2d 805 (1942) 11

State v. Madsen, 28 Utah 2d 108, 498 P.2d 670 (1972) 24, 25, 31

State v. Miles, 122 Utah 306, 249 P.2d 211 (1952) 10

State v. Rees, 43 Utah 447, 135 Pac. 270 (1913) 10

State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970) 14

State v. Sims, 30 Utah 2d 357, 517 P.2d 1315 (1974) 2, 22

State v. Smith, 11 Utah 2d 287, 358 P.2d 342 (1961) 16

State v. Sullivan, 6 Utah 2d 110, 307 P.2d 212 (1957) 27

State v. Thatcher, 108 Utah 63, 157 P.2d 258 (1945) 13

State v. Thompson, 396 S.W. 2d 697 (1965) 23

TABLE OF CONTENTS—Continued

Page

CONSTITUTIONS AND STATUTES CITED

FEDERAL

U.S.C., Const. Amendment 14 (1970) 15, 20, 24, 25, 29

Rule 19, Rules of the Supreme Court, 28 U.S.C. (1974) i

Rule 33, Rules of the Supreme Court, 28 U.S.C. (1974) 35

STATE

Section 76-35-15, Utah Code Annotated (1953) 2, 8, 9, 10, 11

Rule 45, Rules of Evidence 29, 31

MISCELLANEOUS

33 A.L.R.3d 42 15

Wharton's Criminal Evidence, 13th Ed. § 210 (1972) 26

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6397

LOREN CRAIG SIMS,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner's jury conviction for the crime of rape so insufficiently supported by evidence as to require review by this Court by petition for Writ of Certiorari?

2. Did denial of petitioner's motion for change of venue at trial deny petitioner due process of law under the facts presented on appeal?

3. Do the facts presented on appeal indicate petitioner's motion to depose the prosecutrix was properly presented at

trial; and, if presented, did the denial of such motion violate petitioner's right to due process of law?

4. Was reversible error committed by the trial judge in allowing the prosecution to introduce into evidence the clothing worn by the prosecutrix at the time of the rape?

5. Was petitioner denied due process of law by the introduction of allegedly perjured testimony of Robert Yockey?

6. Did the exclusion of the testimony of Jack Brady deny the petitioner due process of law at trial?

STATEMENT OF THE CASE

Petitioner, Loren Craig Sims, was convicted of rape in the District Court of the Third Judicial District, in and for Salt Lake County, State of Utah, in violation of Utah Code Ann. § 76-53-15 (1953) on October 28, 1971. On December 3, 1971, petitioner was sentenced to be confined in the Utah State Prison for an indeterminate term.

Thereafter, petitioner perfected an appeal to the Utah Supreme Court presenting the same issues now before this Court on petition for certiorari. The Utah Supreme Court, on January 8, 1974, considered the issues presented by petitioner and denied the errors alleged constituted reversible error or denied petitioner due process of law, *State v. Sims*, 30 Utah 2d 357, 517 P.2d 1315 (1974).

On March 13, 1974, petitioner perfected his petition for writ of certiorari to the United States Supreme Court for review of the above entitled case of the Utah Supreme Court, No. 12966.

Respondent submits this brief in response, pursuant to request of the United States Supreme Court dated April 22, 1974.

Respondent agrees with the facts as presented in petitioner's Statement of the Case, with the following additions and corrections:

1. There is a question with regard to the time sequence of events after petitioner and Miss Link came down Mill Creek Canyon. Miss Link testified that after coming down Millcreek canyon, she and the petitioner arrived at Lew Arnold's house at 11:30 p.m. or 12:00 a.m. (T. 96) and stayed there about an hour. They then left the Arnold house and arrived at Miss Link's boyfriend's house at 1:00 a.m. (T. 97). Her boyfriend was not home and Miss. Link requested that Sims take her home. Sims requested that they go by his shop because he feared that it might have been burglarized. They arrived at Sims' shop at 1:30 a.m. (T. 99). They didn't go to any other residences between the time they left her boyfriend's house and they arrived at Sims' shop (T. 132, 133). The jury verdict would indicate the acceptance of the above statement rather than petitioner's statement of such facts.

2. When they arrived at the shop, no lights were on (T. 99). Sims unlocked the door and asked Miss Link to come inside with him because he was afraid (T. 100). Sims told Miss Link to go in front of him (T. 101). She started walking in front of Sims and was hit on the head several times and fell to the floor unconscious. She heard nothing before she was hit (T. 101, 103). When she came to, she was aware that her pants were

down and that two buttons were torn off of them (T. 104). She also testified that she wasn't in the same location in the shop as when she had collapsed (T. 104).

3. When she came to, Sims told her that burglars had hit her. She responded that she thought Sims had struck her (T. 104).

4. Sims made contradictory statements to the court and to police officers with regard to the above mentioned incident.

(a) Harold Lee Robinson, who, at the time the alleged rape took place, was a police officer for the Salt Lake City Police Department, testified that Sims told him that when he and Miss Link arrived at his shop, the third time, the lights were on and the padlock on the door was open, but the hasp was closed. Robinson further testified that Sims told him (Robinson) that he (Sims) went into the shop, turned off the lights, locked the door and returned to the car. Robinson testified that Sims told him he felt impressed to return to the shop and Miss Link accompanied him, because she was scared and didn't want to stay in the car (T. 26-287).

(b) Richard A Johnson, a police officer for Salt Lake City, testified that Sims told him that when he and Miss Link arrived at his shop, the lights were on and the door was open. Johnson testified that Sims told him he turned off the lights and was going to lock the door when Miss Link came up beside him. Sims then told Officer Johnson he decided to go into the shop, whereupon he was hit and shoved down without losing consciousness. He told Officer Johnson that he

immediately got up, helped Miss Link into the car and took her to the hospital (T. 260).

(c) Lee Price, a Salt Lake City police officer, testified that Sims told him that on the third visit to his shop, as he arrived, he noticed that the door was open and the lights were on. Sims then said that he went inside, checked around, turned off the lights, locked the door and left. Price testified that Sims stated he then went back to the car, decided something was wrong, and returned to the shop with Miss Link where, upon unlocking the door, he was struck. Sims himself testified, with regard to these events, that he drove to the shop and the lights were out and the door was ajar. Miss Link got out of the car with him. The hasp was not shut, and he didn't see the lock (T. 101).

(d) In another instance, Sims denied that any statement was made to him about a sexual attack on Miss Link until some time after December 5, 1973. Lee Price testified, however, that he told Sims on December 5, 1973, that Miss Link had said she had been raped (T. 266). Harold Lee Robinson testified that he heard Lee Price tell Sims that Miss Link claimed she'd been raped (T. 291). (Testimony was admitted only for the purpose of impeachment).

(5) Miss Link testified that when she awoke in Sims shop, she believed Sims had struck her. She also believed that she had been raped (T. 219).

(6) Dr. Victor Stevenson testified that he examined Miss Link at approximately 9:00 a.m. on December 5, 1970, and found mobile sperm

in her vagina; that, in his medical opinion was deposited there within the last 12 hours (T. 164).

(7) It was established that Sims came by to pick Miss Link up at 9:00 p.m. (T. 86) on December 4, He was with her until he took her to the hospital in the early morning hours of December 5. Dr. Stevenson made his examination of Miss Link at approximately 9:00 a.m. on December 5, 1970.

(8) Miss Link testified that she was never married to Craig Sims and didn't give Sims permission to have sexual intercourse with her (T. 502).

(9) Rober Allen Yackey testified that on or about September 15 or 16 (T. 174), Sims, in a conversation with him on the third floor of the Salt Lake County Jail, told him (Yockey) that he (Sims) had taken a girl to his shop, knocked her unconscious, and raped her (T. 105 or 178).

(10) Gary Phelps was called to rebute Mr. Yockey's testimony. He (Gary Phelps) testified that he had overheard a conversation between Sims and Mr. Yockey, in which Sims said that he had jumped in his shop. Mr. Phelps testified that this conversation took place between September 21, 1971, and October 1, 1971, nearly a week after Mr. Yockey's private conversation with Sims on the 15th or 16th of September.

(11) Keith Stauffer testified that he interviewed Sims on December 7, 1970, in his office at the Metropolitan Hall of Justice (T. 271). At the time of the interview, Sims was not a suspect (T. 272) in the present rape case. During the course of the interview, Stauffer advised Sims of his "Miranda rights" (T. 665) because his

account of the events of December 4 and 5, 1970, was different from that told by Miss Link (T. 278).

(12) Evidence of injury to Miss Link's breast was introduced (T. 111).

ARGUMENT

POINT I

(A) PETITIONER'S UNSUPPORTED ATTACK UPON THE SUFFICIENCY OF EVIDENCE AT TRIAL DOES NOT PRESENT A CONSTITUTIONAL ISSUE REVIEWABLE ON PETITION FOR WRIT OF CERTIORARI.

While the Utah Supreme Court has consistently insisted upon the requirement of "proof beyond a reasonable doubt" in all criminal convictions, they have not insisted upon corroboration of the testimony of the prosecutrix in a rape conviction when there exists sufficient circumstantial evidence to satisfy the burden of proof aforesaid, see *State v. Hodges*, 14 Utah 2d 197, 381 P.2d 197 (1963), and cases cited under paragraph B of Point I.

In the instant case on review, there existed ample and compelling evidence to convince the average juror of guilt beyond a reasonable doubt, see paragraph B, *Infra*. Defendant's alibi story of intervening burglars is so preposterous, under the factual circumstances of this case, as not to approach the standard of doubt or evidentiary insufficiency required by this Court to reverse or review a jury verdict of guilty.

In *Wolfe v. State of North Carolina*, 364 U.S. 177, 196

(1960), this Court held it will not examine, anew, a determination of factual issues by state courts where exception is taken only as to the weight and sufficiency of the conviction. It has become axiomatic in constitutional law that exception to the sufficiency of evidence to support a jury verdict does not, alone, raise a constitutional question reviewable by the Supreme Court on writ of certiorari where there is a reasonable quantum of evidence presented to sustain the conviction. *Baldwin v. Kansas*, 129 U.S. 52, 57 (1889), *Lavender v. Kurn*, 327 U.S. 645, 652 (1946), and *Akins v. Texas*, 325 U.S. 398, 402 (1945).

In accordance with the foregoing constitutional principles and the factual basis of petitioner's conviction (as presented in paragraph B, *infra)*; the attack upon the sufficiency of evidence in the instant case should be dismissed as not raising a constitutional issue reviewable on petition for writ of certiorari by this Court.

(B) THE FACTS PRESENTED AT TRIAL WERE SUFFICIENT TO SUPPORT PETITIONER'S JURY CONVICTION OF THE CRIME OF RAPE UNDER UTAH LAW.

The crime of rape is defined in Section 76-53-15, Utah Code Ann. (1953), as "[A]n act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under any of the following circumstances:

"(1) When the female is under the age of thirteen years.

(2) Where she is incapable, through lunacy or any other unsoundness of mind, whether

temporary or permanent, of giving legal consent.

(3) *Where she resists, but her resistence is overcome by force or violence.*

(4) Where she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution, or by any intoxicating, narcotic or anaesthetic substance administered by or with the privity of the accused.

(5) *When she is at the time unconscious of the nature of the act, and this is known to the accused.*

(6) Where she submits under the belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense or concealment practiced by the accused with intent to induce such belief." (Emphasis added.)

The evidence presented by the state showed that the petitioner Sims violated Section 76-53-15, U. C. A. The evidence presented show that on the morning of December 5, 1970, Sims (1) requested the prosecutrix to precede him into his shop; (2) then struck her over the head, rendering her unconscious; (3) and while the prosecutrix was in this unconscious state, the defendant Sims engaged in sexual intercourse with her against her will.

The actions of the petitioner clearly fall within the proscribed activities set forth in Section 76-53-15, U. C. A. (1953), defining the act of rape.

Specifically, Miss Link at no time consented to en-

gage in the act of intercourse with defendant. In order to overcome her will not to have intercourse with him, defendant Sims struck her over the head, rendering her unconscious; and thus overcoming her will not to have intercourse with him. This action falls within the prohibitions of Subsection 3 of Section 76-53-15, U. C. A. (1953).

In addition, at the time intercourse occurred, the prosecutrix was unaware of its occurrence. Sims' act, that of knowingly engaging in intercourse with the prosecutrix while she was unconscious of the nature of the act, falls within the proscribed activity set forth in Subsection 5 of Section 76-53-15, U. C. A. (1953). There was ample evidence before the jury to prove the elements of the crime of rape.

Utah courts deem the uncorroborated testimony of the prosecutrix sufficient to sustain a guilty verdict. (See *State v. Rees*, 43 Utah 447, 135 P. 270 (1913); *State v. Boyes*, 47 Utah 474, 155 P. 335 (1916); *State v. Miles*, 122 Utah 306, 249 P.2d 211 (1952); *State v. Hodges*, 14 Utah 2d 197, 381 P.2d 81 (1963). It goes without saying that such uncorroborated testimony is sufficient to make out the elements of the crime.

The prosecutrix testified that upon regaining consciousness, after being struck in Sims' shop, she found her pants down and two buttons were off of them. She then testified that she believed Sims had both struck her and raped her (T. 104).

Although sufficient alone to sustain a conviction, the prosecutrix's testimony was corrobarted by the following: (1) she was treated for massive head injuries at the L. D. S. Hospital on the morning of December 5, 1970; (2) a picture

of the prosecutrix's injured breast was introduced into evidence (T. 111) — she previously testified that prior to her date with Sims, her breast had not been injured (T. 104) — (3) Dr. Victor Stevenson testified that he performed a pelvic exam of Pauline Link at 9:00 a.m. on December 5, 1970. During the course of this exam, he found mobile sperm in the prosecutrix's vagina. He further testified that in his best medical judgment, this spermatazoa had been deposited by means of intercourse within the previous 12 hours (T. 163-164). The prosecutrix had previously testified that she had not engaged in sexual intercourse for the previous five or six days (T. 485). This testimony raised the unrebutted presumption that the spermatazoa was deposited in this prosecutrix by means of intercourse with petitioner Sims. The prosecutrix also testified that she was not married to the defendant and that she had never consented to have intercourse with him. The state's evidence clearly made out the crime of rape as set forth in Section 76-53-15, U. C. A. (1953).

Appellant would have this Court believe that the evidence presented by the state was also insufficient to sustain a verdict of guilty. In *State v. Laub*, 102 Utah 402, 131 P.2d 805 (1942), the Utah Supreme Court articulated the rule to be followed in the state courts when questions of the sufficiency of the evidence are raised. Justice Wolfe, in speaking for a unanimous court, said:

> *While the State's evidence is circumstantial, such evidence may lie just as conclusive or even more so than direct evidence,* but the prosecution still has the burden of proving beyond a reasonable doubt that the defendant is guilty. Or

> stated another way, the prosecution must "not only show by a preponderance of evidence that an offense was committed, and that the alleged facts and circumstances are true, but they must also be such facts and circumstances as are incampatable, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than the defendant's guilt." *People v. Scott*, 10 Utah 217, 37 P. 335 . . . As pointed out in Undersill's Criminal Evidence, Fourth Edition, page 21, "All the circumstances as proved must be consistent with each other, and they are to be taken together as proved. Being consistent with each other and taken together, they must point surely and unerringly in the direction of guilt. * * *" 131 P.2d at 807. (Emphasis added.)

The evidence presented by the state was incompatible with any other finding than that Sims: (1) took the prosecutrix to his shop; (2) requested that she precede him into the shop; (3) struck her over the head; (4) raped her and (5) made up a story of robbery to cover the crime.

The following evidence supports this hypothesis: (1) Miss Link testified that Sims unlocked the door of the shop and requested that she precede him inside (T. 101); (2) she testified she was struck on the head from behind (the location of the defendant) and fell unconscious to the floor (T. 101); (3) when she gained consciousness she testified that her pants were down below her knees and some of the buttons had been torn off (T. 104); (4) she testified that at that time she believed she had been struck on the head and raped by Sims (T. 104); (5) the finding of spermatazoa by Dr.

Stevenson during a pelvic exam of Miss Link (T. 163); (6) the inconsistent and conflicting statements made by Sims to police officers with regard to the alleged burglary of his shop. From this evidence, a jury could and did find beyond a reasonable doubt that the defendant raped the prosecutrix (see Statement of the Case).

It would have been incredible for Sims and Miss Link to be struck over the head by burglars at Sims' shop, as appellant maintains. There was no evidence of a forced entry, i.e., no damage to the locks, doors or windows of the shop; no reported loss of property nor signs of a struggle or fight.

It is just as illogical to believe that Miss Link would fabricate a rape story in order to explain away evidence of sexual intercourse with her boyfriend when the pelvic exam which showed that intercourse had taken place was only performed after allegations of rape were made by Miss Link. Had Miss Link not claimed rape during the examination of her head wounds, the pelvic exam would not have been conducted; and the fact that intercourse had taken place would not have been established.

The possibility of any other reasonable hypothesis being foreclosed, the jury was justified in concluding, as they did, that Miss Link had been raped by the petitioner.

Even if more than one reasonable inference could be drawn from the evidence, the Utah Supreme Court, in *State v. Thatcher*, 108 Utah 63, 157 P.2d 258 (1945), stated that "where different reasonable inferences can be drawn from the evidence, the question is one exclusively within the providence of the jury"—*Id.* at 68. The evidence being more than adequate to sustain the finding of fact arrived at by the

jury, this Court should be very reluctant to overturn that jury verdict.

This point was again articulated by that court in *State v. Schad*, 24 Utah 2d 255, 470 P.2d 246 (1970). The court wrote:

> "[W]here a conviction is based on circumstantial evidence, the evidence should be looked upon with caution, *and that it must exclude every reasonable hypothesis except the guilt of defendant.* This is entirely logical, because if the jury believes that there is a reasonable hypothesis in the evidence consistent with the defendant's innocence, *there would naturally be a reasonable doubt as to his guilt.* Nevertheless, that proposition does not apply to each circumstance separately, but is a matter within the prerogative of the jury to determine from all of the facts and circumstances shown; and if therefrom they are convinced beyond a reasonable doubt of the defendant's guilt, it necessarily follows that they regarded the evidence as excluding every other reasonable hypothesis unless upon our review of the evidence, and the reasonable inferences fairly to be deduced therefrom it appears that there is no reasonable basis therein for such a conclusion we should not overturn the verdict. 470 P.2d at 247. (Emphasis added.)

See also *State v. Berchtold*, 11 Utah 2d 208, 357 P.2d 183 (1960).

The jury had sufficient basis from the evidence presented at trial to find the defendant guilty of the crime of rape beyond a reasonable doubt. This Court should, therefore, re-

frain from overturning the findings of the jury and should sustain the verdict and judgment of the trial court.

POINT II

(A) THE DENIAL OF PETITIONER'S MOTION FOR A CHANGE OF VENUE AT TRIAL WAS NOT AN ABUSE OF DISCRETION AFFORDING PETITIONER REVIEW BY THIS COURT ON WRIT OF CERTIORARI.

The denial of petitioner's motion for a change of venue has been found to be within the sound judicial discretion of the trial court. *Stroud v. United States*, 251 U.S. 15 (1919), and cases annotated in 33 ALR3d 42. A denial of a motion for change of venue may only create an abuse of discretion, in violation of petitioner's constitutional right to trial by due process of law, when the expected publicity surrounding a spectacular or heinous offense is shown to create *actual* prejudice in the minds of the jurors. The mere existence of publicity or notoriety associated with the crime before trial is not alone sufficient, *United States v. McNally*, 485 F.2d 398, 402 (8th Cir. 1973).

The conduct of a trial by the state courts in a district having proper jurisdiction over the defendant and ready access to evidence and witnesses serves legitimate state interests. The state's denial of petitioner's request for a change of venue, in support of such state interests, does not present a sufficient abrogation of due process to be reviewed by this Court on writ of certiorari, unless petitioner can establish a demonstrable showing such procedure was in derogation of

his right to a fair trial, *Kersten v. United States*, 161 F.2d 337, 339, *cert. den.* 331 U.S. 851 (10th Cir. 1947).

The state's interests in procedure should be observed, since there is not a clear showing that the denial of defendant's motion for change of venue violated his right to a fair trial, *Henry v. Mississippi*, 379 U.S. 443 (1965).

It is respondent's position, petitioner has not established that clear showing of prejudice (under the facts presented in paragraph B, *infra*,) necessary for this Court to challenge the state court's denial of petitioner's motion for a change of venue at the trial level. Consequently, petitioner's prayer for writ of certiorari should be denied as to this point.

(B) THE EVIDENCE SUPPORTS THE PROPRIETY OF THE TRIAL COURT'S REFUSAL TO GRANT DEFENDANT'S MOTION AT TRIAL FOR A CHANGE OF VENUE.

It is a well settled position in Utah case law that a change of venue is within the trial court's judicial discretion and subjected to review only for abuse of such discretion. In appellate review of the exercise of this discretion, the appellant must satisfy the Utah Supreme Court that the trial court exercised its discretion clearly against reason and evidence, *State v. Smith*, 11 Utah 2d 287, 358 P.2d 342 (1961); *State v. BeBee*, 110 Utah 484, 175 P.2d 478 (1948); *State v. Carrow*, 64 Utah 87, 228 P. 563 (1924); *State v. Green*, 86 Utah 192, 40 P.2d 961 (1935). Respondent submits that petitioner has failed to show that the trial court exercised such abuse.

It is recognized that there was publicity commensurate

with the magnitude of the crime. This cannot, and should not be eliminated. A mere showing of publicity on its own, however, is not sufficient grounds for granting a change of venue. The likelihood of prejudice must be shown to be so persuasive that it would influence the jury and prevent a fair trial.

The case of *Sheppard v. Maxwell*, 384 U.S. 333, (1966), cited as support for petitioner's position, involved prejudicial news coverage carried to the extreme.

> "Much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation and must be guilty since he had hired a prominent criminal lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a "Jekyll-Hyde"; that he was a "barefaced liar" because of his testimony as to a police treatment; and, finally, that a woman convict claimed Sheppard to be the father of her illegitimate child." 384 U.S. at 356-7.

Such glaring prejudice is found nowhere is the news coverage of the Craig Sims trial.

The court in *Estes v. United States*, 335 F.2d 609 (5th Cir. 1967), *cert. den.*, 379 U. S. 964, *rehearing den.*, 380 U. S. 926, followed the Supreme Court decision in *Beck v. Washington*, 369 U. S. 541 (1962), when they said:

> There was no specific showing of bias and prejudice by appellant resulting from the wide-

spread publicity, and the fact alone of such publicity did not in itself constitute a sufficient showing of bias and prejudice.

Petitioner cites *Irvin v. Dowd*, 366 U. S. 717 (1961), to support his contention. A close reading of that case will show that the appellant there had become a notorious celebrity in a relatively small county — unlike the petitioner in our case. In building up to their decision in the case the court discussed their feelings regarding normal publicity for a criminal prosecution. In 366 U. S. at pages 722 and 723 they said:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important ant case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebute the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies v. Illinois*, 123 U. S. 131, 41 L. Ed. 80, S. Ct. 21, 22; *Holt v. United States*, 218 U. S. 245, 54 L. Ed. 1021, 31 S. Ct. 2, 20 Ann. Sas. 1138; *Reynolds v. United States*, 98 U. S. 145, 155, 25 L. Ed. 244, 246.

The Utah Supreme Court is clear in stating that if a

juror is aware of the facts, and even has an opinion regarding them, so long as he can lay aside that opinion and render a verdict on the facts there has been no reversible error committed. In *Sinclair v. Turner*, 20 Utah 2d 126, 434 P.2d 305 (1967), affirmed, 447 F.2d 1158 (10th Cir. 1971), *cert. den.*, 391 U. S. 924 (1968), the Utah Supreme Court held that the fact that jurors may have become aware of purported facts of a case through publicity does not disqualify them if they can swear to impartiality.

An examination of the trial record shows that the judge specifically questioned the potential jurors as to whether or not "[t]hey had seen the defendant's name in print" (T. 58) or if they had seen or heard a news report concerning the defendant Sims on the radio or television (T. 58). Finally, the judge asked whether any of the jurors had "[a]ny knowledge whatsoever about Mr. Sims other than the fact that he is now charged with an offense which is to be tried by this court" (T. 58). Those jurors who answered affirmatively to any of the above questions were dismissed. As can be readily seen, the jury, as finally impaneled, consisted of individuals who had not remembered hearing, reading or seeing anything with reference to Mr. Sims in the news media. This clearly shows a lack of prejudice on the part of the jury. To insure as much as possible that once impaneled the jury would not be prejudiced, the court further instructed the jury, during the course of the trial, to remain aloof from all outside influences of publicity (T. 141, 288). More specifically, at the request of defense counsel, the court reminded and admonished the jury to avoid newspapers and television in order to avoid obtaining any factual information outside of the courtroom (T. 385).

Respondent submits that in view of the care with which the jury was selected and the manner in which the trial was conducted, petitioner's contention that reversible error was committed by the trial court in denying his motion for a change of venue is without merit and should be dismissed accordingly.

POINT III

(A) RESPONDENT DENIES, FROM THE FACTS, PETITIONER'S MOTION TO DISPOSE THE PROSECUTRIX WAS PROPERLY PRESENTED AT TRIAL. EVEN IF SUCH MOTION WAS DENIED BY THE TRIAL COURT, THE DENIAL WOULD NOT CONSTITUTE A VIOLATION OF DUE PROCESS OF LAW REVIEWABLE BY THIS COURT ON WRIT OF CERTIORARI.

A state court has broad discretion to deny the introduction into evidence of a disposition collateral in nature, unless such denial would be clearly and patently prejudicial to the defendant, *N.L.R.B. V. Donnelly Garment Co.*, 330 U.S. 219, 236 (1947). At trial the central issue was whether the prosecutrix had been assaulted while unconscious, consequently evidence as to prior consensual sexual relations, sought to be established by deposing the prosecutrix, would be collateral and irrelevant. The exclusion of the proffered motion to depose, if presented and denied by the trial judge, could not present a violation of due process of law sufficient to warrant review by writ of certiorari for the following reasons:

(1) Defense counsel had ample opportunity to find

and depose the prosecutrix's boyfriend, Cory Jensen, whose whereabouts was known to defendant as disclosed at trial (T. 97).

(2) Prosecutrix was present at trial and subject to cross-examination upon all relevant matters which may have been explored by defense counsel through deposition.

This Court has consistently maintained procedural rulings of state courts will not be reversed as repungnant to the due process clause of the Fourteenth Amendment to the United States Constitution, unless the totality of the process amounts to a denial of due process, *Buchalter v. People of the State of New York*, 319 U.S. 412, 429 (1943); *Barrington v. Missouri*, 205 U.S. 483 (1907). For the foregoing reasons, respondent maintains that petitioner's motion for deposition was not heard as shown in paragraph (B), and even if heard such a denial could not, under the facts presented, constitute a denial of due process of law.

(B) APPELLANT'S CONTENTION THAT DUE PROCESS OF LAW WAS DENIED HIM WHEN THE TRIAL JUDGE REFUSED TO GRANT HIS MOTION TO DISPOSE THE PROSECUTRIX IS A MISSTATEMENT OF THE FACTS.

Petitioner erroneously contends that his right to due process of law was denied him when the trial court failed to grant his motion to depose the prosecuting witness. Nowhere in the trial record is there evidence that the motion was ever heard by Judge Hall. It goes without saying that if never heard by the judge, the motion could not be denied.

The motion in question may be found in the trial record

at page 7. It was admittedly filed on May 18, 1971, in the Salt Lake County Clerk's office but was never docketed or noticed for hearing in the trial court. The burden of docketing and notice obviously falls on the party desiring the motion to be heard — namely, James N. Barber. This finding of fact was sustained by the Utah Supreme Court, *State v. Sims*, 30 Utah 2d 357, 517 P.2d 1315 (1974).

Respondent respectfully submits that petitioner's contention in this regard is totally without merit and should therefore be ignored. Even if the motion had been heard and denied, no error would have been committed. The general rule followed by the state courts of Utah is that prior to trial, defense counsel does not have a right to preview the state's evidence. This position was articulated by Justice Callister in *State v. Faux*, 9 Utah 2d 350, 345 P.2d 186 (1959). While dissenting on another point, he said:

> "[A] person charged with a crime by information (rather than by indictment) is not afforded the opportunity to preview the prosecution's evidence." *Id.* at 365.

In the case at bar, the deposing of the prosecutrix certainly falls within the preview prohibitation referred to by Justice Callister. This same view has been expressed on numerous other occasions. See *United States v. Garrison*, 291 F. 646 (1923); *Meyers v. State*, Tex. Crim. App., 491 S.W. 2d 412 (1972); *Reynolds v. State*, Ct. of App. Ind., 292 N.E. 2d 290 (1973). The petitioner cites a number of cases for the proposition that reversible error is committed when the prosecution knowingly and purposely withholds and/or hides exculpatory evidence or allows false evidence to go uncorrected. *Napue v. Illinois*, 360 U.S. 264, (1959); *Mooney v. Holohan*, 294

U.S. 103, (1934); *Brady v. Maryland*, 373 U.S. 83, (1963); *State v. Thompson*, 396 S.W. 2d 697 (Missouri, 1965). Respondent asserts that these are inapplicable to the case at bar, since no exclupatory evidence was withheld by the prosecution.

Petitioner would have this court believe that if he had been able to discover the identity of Miss Link's boyfriend, he would have been able to impeach her testimony that she had not engaged in sexual intercourse for five to six days prior to her date with Sims. Respondent respectfully submits that petitioner is merely attempting to create issues for appeal. No evidence has been brought forward showing that Cory Jensen, Miss Link's boyfriend, actually did engage in intercourse with the prosecutrix sooner than five days before her date with Sims. In addition, defense counsel had ample opportunity to discover the name and whereabouts of Cory Jensen during the preliminary hearing. If the importance of Cory Jensen's testimony was discovered after the preliminary hearing, the defendant Sims could have told Mr. Barber where Cory lived, since Sims and Miss Link had been at Jensen's residence on December 5, 1970 (T. 97). It would have then been a simple task to go to Cory's residence and obtain the supported "exculpatory evidence."

The other cases cited by petitioner are of little worth, since they deal with criminal actions in federal courts. Such actions are governed by federal rules of criminal procedure, which rules were clearly inapplicable in the Utah State Court proceeding.

POINT IV

(A) THE TRIAL COURT JUDGE DOES NOT VIO-

LATE DUE PROCESS BY RULING ON THE ADMISSIBLITY OF MATERIAL EVIDENCE.

The *Barrington* case, as cited in Point III, affirmed the discretion of the trial court to determine the admissibility of evidence. The Court found such determinations by a trial court should not be disturbed on review unless egregious error amounting to a patent violation of due process was shown from the totality of the trial record. In the case on review, the evidence clearly was connected with the offense. The custody of the undergarments in question was sufficient under the circumstances, and the jury was free to attach such weight to the condition of the garments as they found appropriate.

The admissibility of evidence and the substantiality of factual determination is the sole province of the trial court where, as in the case on review, such determinations are not demonstrably unreasonable. See *Wolfe v. State of North Carolina, supra.*

(B) NO REVERSIBLE ERROR UNDER UTAH LAW WAS COMMITTED BY THE TRIAL JUDGE IN ALLOWING THE PROSECUTION TO INTRODUCE INTO EVIDENCE THE CLOTHING WORN BY THE PROSECUTRIX AT THE TIME SHE WAS RAPED.

The trial court at its discretion allows evidence connected with the commission of a crime to be introduced if the court is satisfied that the evidence is in substantially the same condition as at the time the crime was committed (*State v. Madsen,* 28 Utah 2d 108, 498 P.2d 670 (1972). In deciding whether or not to allow evidence to be introduced, the court

considers the circumstances surrounding the preservation and custody of the evidence. If, after considering these factors the trial court determines that the items in question are in substantially the same condition, they may be admitted. In the case at bar, the trial court heard testimony from which it would and did conclude that the clothing of prosecutrix, introduced at trial, was in substantially the same condition as it was at the time it was removed from her in the L.D.S. Hospital on December 5, 1970. The prosecutrix testified that at the time the clothing was removed, it was soiled. Specifically, she testified that the panties were soiled and dirty when they were taken off at the hospital. She then testified that they were in substantially the same condition — that is, soiled and dirty — When they were introduced into evidence in the trial court. The trial court was, therefore, satisfied that the clothing was in substantially the same condition and, therefore, admissible. Any prejudice which may have been done to defendant's case by the introduction of questionable evidence is eliminated, because the jury may disregard the evidence if there is doubt as to whether or not the article in question is "substantially the same" or if correct custody procedure were followed. Thus, there exists a double safeguard assuring that the defendant remains free from any ill effect which may result from the introduction of erroneous evidence.

It appears that, as a consequence of these two safeguards —namely, the trial judge and the jury — the Utah Supreme Court has declined to overturn the ruling of the trial court in these matters unless there is a showing of actual abuse of discretion on the part of the trial judge (*State v. Madsen*, supra, at 111).

If error was committed, and respondent maintains there was none, such error was so minimal as to fall within the harmless error category. The state's case, even without the admission of the clothing worn by the prosecutrix, was strong enough to sustain a verdict of guilty. (Review of the sufficiency of the state's evidence will not be undertaken here in order to conserve this court's valuable time. Instead, the Court will be respectfully referred to the arguments presented in Point I of Respondent's Brief.)

POINT V

(A) THERE WAS NO DENIAL OF DUE PROCESS OF LAW BY THE INTRODUCTION OF THE TESTIMONY OF ROBERT YOCKEY.

Admissions to the offense charged by a defendant, without a showing of coercion of any type, to another incarcerated individual have traditionally been admitted as corrobrating testimony, see Wharton's *Criminal Evidence* 13th Ed., § 210 (1972). Such evidence has also been admissible to impeach the conflicting testimony offered by the defendant at trial. In *Burrows v. United States*, 371 F.2d 434 (10th Cir. 1967) prior inconsistent statements made to an investigatory officer of the FBI by a defendant, on collateral matters, was allowed into evidence to impeach defendant's testimony as to why he was in Iowa at the time of the offense.

Nothing in the record at trial (see discussion in paragraph B, *infra*) would substantiate petitioner's contention the testimony of the witness, Mr. Yockey, was perjured. In *Glasser v. United States*, 315 U.S. 60, 77 (1942), this Court held the credibility of a third party witness was for the jury

to determine regardless of how "unsavory" or "disreputable" they may appear. In the instant case, the jury was free to attach whatever credibility they believed the testimony of Mr. Yockey warranted. Since the testimony was highly relevant, no constitutional error was committed by the testimony of Mr. Yockey absent the clear showing such testimony was perjured.

For these reasons, the admission of the testimony of Robert Yockey into evidence at trial was both proper and permissible. Petitioner has not raised an issue reviewable on petition for writ of certiorari.

(B) REVERSIBLE ERROR WAS NOT COMMITTED, UNDER STATE LAW, NOR UNDER THE FACTS, BY THE INTRODUCTION OF THE TESTIMONY OF ROBERT YOCKEY.

Petitioner asserts that reversible error was committed by the state in introducing the testimony of Robert Yockey during the trial proceedings. It appears that petitioner would have this Court assume the responsibility of the jury and rule on the credibility of a witness. Such a position is clearly contrary to the position taken by the Utah Supreme Court. In *State v. Sullivan*, 6 Utah 2d 110, 307 P.2d 212 (1957) at 114, that court said:

> The very essence of a trial by jury is that the jury are the exclusive judges of the weight of the evidence, the credibility of the witnesses and the facts to be found therefrom.

Clearly, it is the prerogative of the jury to determine fact

from fiction, truth from falsehood. To usurp this jury function would undermine the very foundation of criminal justice.

If Robert Yockey's testimony was as "[o]bviously fabricated" (Petitioner's Brief — P. 123) as petitioner maintains, defense counsel should have had no trouble discrediting such testimony under cross examination or introducing rebutting testimony. Such is the purpose of the adversary system of the law. Any attack on the quality of testimony should be made in the trial before the trier of fact to insure the proper functioning of that system.

Although Yockey did testify that Sims told him he called the police from his shop, this inconsistency, when reviewed in the context of the entire testimony, does not make him a prevaricator or liar, as petitioner maintains. If mere inconsistencies render testimony inadmissible, and the inclusion of such testimony, reversible error, the testimony of Mark Richmond should be excluded also. Rather, inconsistencies go to the credibility of the witness. In *State v. Jarett*, 112 Utah 335, 178 P.2d 547 (1947), at 340, the Utah Supreme Court said:

> However these uncertainties and inconsistent statements go *only* to the credibility of the witnesses, and to the weight to be given to their testimony. These are properly matters for the jury's determination and we assume were considered by the jury during its deliberation.

Petitioner further cites numerous cases for the proposition that the knowing use of perjured testimony is reversible error. Respondent submits that not only has petitioner failed to show that the State knowingly used perjured testimony

but has failed to show what perjured testimony was used. Respondent therefore respectfully submits no reversible error was committed in introducing the testimony of Robert Yockey.

POINT VI

(A) THE EXCLUSION OF COLLATERAL OR EXTRANEOUS EVIDENCE IS WITHIN THE SOUND DISCRETION OF A TRIAL COURT, AND DOES NOT VIOLATE DUE PROCESS OF LAW.

The exclusion of the proffered testimony of Jack Brady, as to the moral character of the prosecutrix, was properly excluded as extraneous and collateral under Utah Rules of Evidence, Rule 45:

> "Except as in these rules otherwise provided, the judge may in his discrtion exclude evidence if he finds that its probative value is substantially overweighted by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered."

Evidence of the moral character of the prosecutrix was not in issue, since consent could not be a defense to a rape occurring during a period of unconsciousness as established at the trial level. The exercise of discretion by the trial court in excluding the proffered testimony of Mr. Brady was edequately premised in reason and propriety. The trier of fact's

rulings on such collateral matters should be accepted where they are reasonable within the factual matrix of the case at trial, *Akins v. State* of Texas, 325 U.S. 398, 402 (1945). In *Jayson v. United States*, 294 F.2d 808, 810 (1961), the Fifth Circuit held, in a civil action, the trial court will be presumed correct in passing on the admissibility and weight of evidence.

Clearly, the exclusion of the proffered testimony of Jack Brady did not constitute a denial of due process reversible upon writ of certiorari.

(B) THE TRIAL COURT WAS CORRECT, UNDER UTAH LAW, IN REFUSING TO ADMIT THE TESTIMONY OF JACK BRADY CONCERNING THE PROSECUTRIX'S REPUTATION.

The general rule regarding the admissibility of evidence concerning the prosecutrix's reputation for chastity in rape proceedings, is that such evidence is admissible if consent is raised as a defense.

This view was expressed by the Utah Supreme Court in *State v. Scott*, 55 Utah 553, 118 P. 860 (1920) at 563:

> "In view that the defendant denied that he was twith he prosecutrix on the night in question, and denied that he had had sexual intercourse with her then or at any time, we cannot conceive how such evidence had any relevancey in this case, except perhaps to affect the credibility of the prosecutrix."

A similar view has been adopted in other jurisdictions. In *People v. Gabler*, 111 Ill. App. 2d 121, 249 N. E. 2d 340

(1969), the Illinois Appellate Court upheld the trial court's refusal to admit testimony of the prosecuting witness's reputation for chastity, saying:

> "The reputation for chasity in a rape case is only matrial where the defense is consent." *Id.* at 343.

A similar view was expressed in *People v. Cox*, 383 Ill. 617, 622, 50 N. E. 2d 758; *Shepard v. State*, Okl. Cr., 437 P.2d 565, 600 (1967); *Jackson v. State*, 470 S. W. 2d 201 (Tex. 1971). In applying these holdings to the case here on appeal, it is clear that no error was committed, since, clearly, the issue of consent was never raised by the defendant. In fact, defendant denies that intercourse even occurred. The reason for the existence of such a rule is apparent. While the prosecutrix's reputation for chastity is material when the issue of consent is raised, the prejudicial effect that such evidence has, absent the issue of consent, far outweighs any purpose to be served by its introduction. To confuse the issue before the jury with the sensationalism which accompanies testimony of this type would compound the difficulties inherent in criminal rape proceedings. Rule 45, Rules of Evidence, vests with the trial judge the authority to exclude the type of testimony in question, here, if "he finds that the probative value is substantially outweighed by the risk that its admission will (b) create substantial danger of undue prejudice or of confusing the issues of misleading the jury . . ." (Rule 45, Utah Rules of Evidence). As previously stated, the state court will overturn the ruling of a trial judge to admit evidence only if the judge has abused his discretion. See *State v. Madsen*, 28 Utah 2d 108, 498 P.2d 670

(1972). For the same reason, the ruling of the trial judge to exclude testimony should carry the same presumption of correctness.

Petitioner contends that the testimony of Jack Brady was necessary to show that Sims had no reason to strike or rape Miss Link in order to have sexual relations with her. His testimony was to rebut the State's contention that Sims assaulted and raped Miss Link because she had refused to have intercourse with him. For this purpose (that of rebutting the State's presumption and helping to establish an alternative reasonable hypothesis) Jack Brady's testimony was of little value. Even with the addition of Mr. Brady's testimony, there was no other reasonable hypothesis other than that Sims took Miss Link to his shop, struck her over the head and raped her because she refused to have intercourse with him. The allegation that a robbery had occurred was not supported by any facts or evidence introduced at trial. The allegation that Miss Link accused Sims of rape because she was afraid her parents would find out about the sexual relations she had had with her boyfriend is illogical, since the evidence of sexual intercourse only came to light after a pelvic exam was performed. That same pelvic exam was performed only after the prosecutrix claimed she had been raped. Had she not claimed rape, the pelvic exam would not have been performed, and she would only have been treated at the hospital for the injuries she sustained as a result of the assault. Any function to be served by Jack Brady's testimony was served by the prosecutrix herself when she openly admitted in court that she had engaged in sexual intercourse with her boyfriend, Cory. That coupled with the fact that she accepted a date with Sims,

a person she didn't know and had never a reasonable indication of the prosecutrix's reputation for chastity and also her credibility. The testimony of Jack Brady was not only prejudicial to the proceedings and, therefore, excluded but also is unnecessary to establish either the reputation of the prosecutrix or her credibity. For the aforementioned reason, the testimony of Jack Brady was correctly excluded from the trial proceedings.

CONCLUSION

For the reasons aforesaid, respondent requests petitioner's prayer for a writ of certiorari be denied as unsupported by the facts presented in his petition and, violative of the sound and proper discretion of the trial court in ruling on factual and evidentiary issues presented.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6397

LOREN CRAIG SIMS,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the United States Supreme Court Rules, 28 U.S.C., County for Respondent certifies that copies of the Respondent's Brief in Opposition have been served by mail on Loren Craig Sims, Petitioner in Pro Se, at the Utah State Penitentiary, P. O. Box 250, Draper, Utah, this 21st day of May, 1974.

Earl F. Dorius

EARL F. DORIUS
Assistant Attorney General
Attorney for Respondent
236 State Capitol
Salt Lake City, Utah 84114